IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 54 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SURESHBHAI JAYANTILAL SHAH

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 54 of 2004

MR BM MANGUKIYA for Petitioner No. 1

MS BELA A PRAJAPATI for Petitioner No. 1

MR JAYANT PANCHAL, LD.SPECIAL PUBLIC PROSECUTOR assisted by MR KT DAVE, LD.APP for Respondent No.1

CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date of decision: 06/04/2005

C.A.V. JUDGMENT

By way of this Revision Application under Section

397 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code'), the petitioner-orig. accused no.4 (hereinafter referred to as 'the accused') has challenged the legality and validity of the order dated 7th January, 2004, passed by the learned Additional City Sessions Judge, Ahmedabad, and the framing of the charge against the accused in Sessions Case No.278 of 2003.

1(i) The accused persons facing trial in the Sessions Case have been charged for the offences punishable under Sections 302, 114 and 120(B) of the Indian Penal Code r/w. Section 135 of the Bombay Police Act. All the accused have been chargesheeted after investigation of the crime registered with Saher Kotda Police Station vide C.R. No.I-128 of 2003. The accused after his arrest was in judicial custody for some period but at present he is on bail and this Court vide order dated 21st November, 2003, has enlarged the accused on bail, after discussing the case of the prosecution against the present petitioner in brief after filing of the chargesheet. In the list of events, tendered to the Court, it is averred that the petitioner-accused has filed an application for quashing the complaint/FIR by way of filing application under Section 482 of the Code being Criminal Misc. Application No.10067 of 2003 and on the day of filing of the present Revision Application, the said quashing petition was pending. A copy of the quashing petition, of course, is not available on record. Pending the petition filed under Section 482 of the Code, the case came to be committed to the Court of Sessions and then listed before the ld.Additional City Sessions Judge for framing of charge. After hearing an application filed by one of the co-accused praying discharge, the ld.Additional City Sessions Judge rejecting the said application decided for framing of charge and framed the charge.

1(ii) It is contended that the petitioner-accused was under impression that he would also get the similar opportunity to pray for his discharge and, therefore, the ld.Presiding Judge would not take up the matter for framing of charge. The advocate of the present petitioner-accused was not present during these proceedings i.e. hearing of discharge application filed by the co-accused, etc. and the grievance of the petitioner-accused before the Court is that after disposal of the application filed by the co-accused, the ld.Presiding Judge took up the matter immediately for framing of the charge and thereby framed the charge. The present petitioner as per the charge framed, is facing serious charge as to involvement in a criminal conspiracy

and thereby, committing offence punishable under Section 302 r/w. Section 120(B) of the Indian Penal Code.

2. As per the case of the prosecution, one Gautambhai K. Shah, a person residing in neighbouring are of the petitioner-accused, has been killed on 28th April, 2003 and the FIR for the said incident has been lodged by one Nilesh Jasvantlal Mehta, on early hours of 29th April, 2003 at about 00-40 hrs. In para:3 of the present Revision Application, the petitioner-accused has narrated the details of the FIR in his own language and to appreciate the contentions raised by the ld.counsel appearing for the petitioner-accused, it would be beneficial to reproduce the facts disclosed by the first informant before the police, which are reproduced in the memo of the petition as under :

"3. The petitioner states that the first information report has been lodged by one Mr.Nilesh Jashwantlal Mehta on April 29, 2003 recorded in Shardaben Hospital at Ahmedabad wherein the first informant has alleged that on April 28, 2003 he was present at his residence at night. He was called by Mr.Gautam K. Shah by visiting his house personally and informed him that since Mr.Gautam Shah wanted to visit Bapunagar, the first informant was requested to accompany Mr.Gautam Shah. Accordingly, both started from their residence situated in Mandvi Pole, Manek Chowk, Ahmedabad in the car of Mr.Gautam Shah. Mr.Gautam Shah informed that he was to Rs.50,000/- from Bapunagar. When they reached near Artech Compound 4-cross a building situated there named and called as Shyamshikhar building, he received a call on his mobile and therefore, he stopped their vehicle and proceeded to a nearby pan shop named and called as Vikas Pan House whereupon one unknown person met him who offered him a pouch of water and he informed that he would make a call and they should wait. The said person made a call from a nearby STD PCO booth. Mr.Gautam Shah informed the first informant that since he was to collect the money, if he was seen in company of the first informant, the said person may not deliver the money and therefore, the first informant was requested to sit on a scooter lying near that STD PCO booth. The said person, after making a phone call, came back and requested to proceed with the said unknown person and accordingly the first

informant and Mr.Gautam Shah proceeded with the said unknown person who had taken them to a dark place at the said building whereupon some other unknown persons emerged and the first informant was threatened to go away and said that they wanted to settle account with Mr.Gautam Shah and he was assaulted on his buttock by the said persons and the person who was emerging therefrom, started assaulting Mr.Gautam Shah by sharp cutting instruments. The first informant stated that he did not know the names of the person who assaulted Mr.Gautam Shah but he would be able to recognise their faces. Since the incident has occurred at about 10.45 PM on the night of April 28, 2003, the first informant stated that he was frightened by the said incident and therefore from a nearby pan shop he made a call to one of his friend Mr.Kiranbhai and therefore, the police control room was informed. After arrival of the police, the injured was removed to the hospital in his car where doctors declared him dead. Therefore, the first information report was lodged which was recorded by Police Inspector, Saher Kotda Police Station in the hospital. The said first information report is recorded as CR-I No.128 of 2003 for the offences punishable under section 302, 324 and 114 read with section 120(b) of the Indian Penal Code and Section 135 of the Bombay Police Act, 1951."

3(i) Undisputedly, three further statements of the first informant have been recorded by the police. The first further statement is recorded immediately after recovery of cellular phone and its number from the injured/deceased. The second statement is recorded after recovery of clothes by the first informant and the third statement is recorded when certain photographs from police record were shown to the first informant to identify, if possible, the person-assailants. An album of history-sheeters was shown fromwhere the first informant identified one of the co-accused Bhavesh Bowler i.e. orig. accused no.1 and Dharmendra @ Dharmo i.e. orig. accused no.2.

3(ii) It is the case of the prosecution that the person who met first to Gautambhai (deceased) and offered a pouch of water was the accused no.1. The police has collected evidence and also recorded the statement of first informant on 4th May, 2003 that the cellular phone of the deceased having No.9825381810 was getting frequent

calls from cellular phone having No.9825463568 (hereinafter referred to as '3568') and it is the say of the prosecution that the said telephone number is (registered in the name) of co-accused Bhavesh i.e. orig. accused no.1. The police has also investigated as to how this telephone subscriber's number was received by the accused no.1. Undisputedly, the said numbered cellular phone has been recovered from the accused no.1 and the ld.counsel appearing for the petitioner-accused has not disputed seriously this part of the evidence collected by the police. On the contrary, in response to the query raised by the Court, it is submitted that merely because the petitioner-accused was getting telephone calls on his cellular phone, he cannot be linked with the serious crime of murder and/or also should not be blamed or held responsible for committing offence of criminal conspiracy. Mr.B.M. Mangukiya, ld. counsel appearing for the petitioner, has posed a question and submitted that this very person i.e. accused no.1, has called number of persons on the fateful day but as to why the police has implicated the petitioner with accused no.1 and involved him in such an offence. Mr.Mangukiya has also attempted to submit before the Court that because of political status and influence in the area; especially Khadiya and other part of wall-city of Ahmedabad, he has been planted as an accused with an ulterior motive by some persons having influence in the Government without naming any leader; and further submitted that one or more of them having birth in the ministry. Mr.Mangukiya has also tried to demonstrate the political influence and the stature of the present petitioner in the public life and also in the business field.

4. I have heard Mr.Mangukiya, learned counsel appearing for the petitioner, at length and he has taken me through each statement recorded by the Investigating Agency and also the documents including the print outs taken from the respective private cellular phone companies. In response to the queries raised by the Court, Mr.K.T. Dave, ld.APP, has also pointed out the situation as to the telephone connection available with the petitioner as well as the deceased as subscribers of Bharat Sanchar Nigam Ltd. (BSNL) through land line network and I have applied mind on the totality of facts emerging from record placed to the notice of the Court as well as the documents which are part of the chargesheet.

5. The deceased-Gautambhai was the Vice President of the Steel Association of Mandavi-ni-Pole, and he was entrusted the work of recovery of amount of

Rs.3,37,000/by one Vijaybhai Harichandra Agarwal from the orig.accused no.3-Laxman @ Lachchu and the present petitioner had some altercations and quarrel in the month of January, 2003, with one Sachin-friend of son of the deceased in respect of collusion of motorcycle and car. Ultimately, the said quarrel had led them to police station and a complaint was also filed and the petitioner-accused had developed and continued some enmity. Being a person responsible in the association and as the deceased was entrusted work by Vijaybhai Agarwal for recovery of said amount from accused no.3, the deceased had started demanding money and, therefore, a conspiracy was hatched and the accused no.3 ultimately informed the deceased-Gautambhai that one of the relatives of the deceased, who is doing business of money lending would make the payment on the day of incident and gave cellular number of orig.accused no.1 i.e.3568. As per the case of the prosecution and the charge, the deceased-Gautambhai telephoned in connection with demand of money on 28th April, 2003 and as per the conspiracy hatched, the deceased was called to come to "Bapunagar Artech Compound" to accept money and as informed the deceased went to the suggested place at about 20-30 hours on 28th April, 2003. When he reached to the building known as Prarthana Complex, near Vikas Pan Parlour, after some informal conversation as narrated in the FIR, the deceased-Gautambhai was assaulted and killed. Thus the say of the prosecution is that all the four accused have committed offence of hatching a conspiracy. The the petitioner-accused is asked to face two different charges i.e. offence punishable under Section 120(B) of the Indian Penal Code as well as Section 302 of the Indian Penal Code r/w. Section 135 of the Bombay Police Act. It is also a charge that the petitioner-accused has committed offence punishable under Section 324 r/w.120(B) of the Indian Penal Code for the injuries sustained by the complainant in the incident.

6(i) It is the main contention in the petition as well as backbone of the argument of Mr.Mangukiya that there is no iota of evidence as to involvement of the petitioner-accused in the crime as a conspirator and he has been falsely implicated in the offence. It is submitted that in absence of sufficient evidence, which can be said to be legal evidence, prima facie the petitioner ought not have been chargesheeted by the police and at least should not be asked to undergo trial of such serious offence and the ld. Presiding Judge ought not have framed charge against the present petitioner.

6(ii) Mr. Mangukiya has taken me through the order passed by the Court enlarging the present petition on bail, wherein the Court has observed that there is clear material contradiction in the statement of Nitin Shamji before the police and before the ld.Magistrate and both are not in consonance with each other. It is argued that the statement recorded by the ld.Magistrate under Section 164 (Retraction) of the Code gives clean-chit to the petitioner-accused, so this part of evidence ought not have been considered as legal prima facie evidence against the petitioner-accused, is one of the submissions of Mr.Mangukiya. Reading paras:6 and 7.1 of the bail order, it is also argued that while enlarging the petitioner-accused on bail, this Court has observed that the second circumstance collected by the police only indicates that the orig.accused no.1 had telephoned the petitioner-accused around the time when the incident occurred from the area in the vicinity of the place of incident and this by itself cannot be considered to be more a ground to link up the present petitioner with the offence so strongly that he is required to be refused bail in absence of any criminal antecedents, etc. The third circumstance available on record is that the petitioner-accused had knowledge about the incident soon after the incident and this fact is stated by one of the prosecution witnesses namely Sapan-son of the deceased-Gautambhai. According to Mr.K.T.Dave, ld.APP, the fact that may also get importance and relevance is that the the deceased as well as the petitioner-accused were neighbours and were known to each other. According to Mr.Dave, it emerges from record that the two principal accused i.e. accused nos.1 and 2, are facing trial as hired killers and actual assailants and none of them individually or jointly had any animosity or ill-feeling with the deceased or his son Sapan nor they are in business field of the deceased. The finding recorded by the bail Court, according to Mr.Dave, would not help the petitioner at this stage and the Court at the relevant point of time was supposed to consider the aspect in the cases based on circumstantial evidence whether the accused in a given set of facts should be kept in custody pending trial or he should be enlarged on bail. So in view of the social status and the scope of securing presence of person-accused during trial, in a case of circumstantial evidence, this Court thought it fit to enlarge the petitioner-accused on bail. The bail Court is not supposed to evaluate intrinsic part or nitty gritty of the story of the prosecution and evidence collected by the Investigating Agency and, therefore, the bail Court had not entered into that area.

7. Mr.Mangukiya, ld.counsel appearing for the petitioner-accused, has taken me through the ground under which the validity of the charge is assailed. However, he has concentrated on certain submissions and some of these points hammered by Mr.Mangukiya is that there is no prima facie evidence of the involvement of the present petitioner for or through accused no.3-Lachchu in the crime in question.

7.1 That the statements of PW-Nitin Shamji and PW-Dipak would not assist the prosecution to prove the charge of conspiracy as Nitin Shamji Dudhela, are recorded under Section 164 of the Code and they were retracted on the very next day.

7.2 That the petitioner-accused had no reason to hatch conspiracy to to kill Gautambhai on alleged grudge against one Jwalit on account of vehicular accident and subsequent criminal complaint or on account of the alleged talk by the petitioner-accused that might have taken place with the accused no.1 on telephone. No legal or valid evidence has been collected as to the nature of talk that had taken place between the petitioner-accused and the orig.accused no.1. It cannot be legally inferred that this part of evidence gives rise even to a suspicion of hatching alleged conspiracy. The grudge with Jwalit, cannot legally be co-related with the incident for carving out a strong motive to kill deceased who happens to be the father of the friend of Jwalit.

7.3 No legal evidence has been collected by the Investigating Agency to prove prima facie that the petitioner-accused and the accused no.3 are known to each other and the petitioner-accused was requested by the accused no.3 to intervene in the chapter of the alleged recovery that was being made by the deceased or as to the fact that the petitioner-accused had accepted the said request of the accused no.3; and in turn had requested the deceased not to demand money on behalf of Vijay Agarwal.

7.4 According to Mr.Mangukiya, there is no legal evidence that the deceased had acceded to the request and, therefore, the petitioner-accused introduced accused nos.1 and 2 to the accused no.3-Lachchu; and that the accused no.3 expressed desire to get Gautambhai (deceased) killed and the conspiracy was hatched.

7.5 Except the documents (especially relevant entries) collected from the cellular phone service providers as to the use of cellular phone of the

deceased, the petitioner-accused and the accused no.1; no evidence has been collected by the Investigating Agency and this record is insufficient to raise even suspicion about the connection of the petitioner-accused either with the accused no.2 or accused no.3. As per the settled legal position, unless there is any element of strong suspicion, a person should not be asked to face trial and according to Mr.Mangukiya, there is no legal and sufficient evidence to raise any suspicious and that too a suspicion for hatching a criminal conspiracy to kill a person who is undisputedly his neighbour. Mr.Mangukiya in support of his submission has placed reliance on various decisions. The first decision cited by Mr.Mangukiya is in the case of Union of India v. Prafull Kumar Samal & another, reported in 1979(3) SCC 4, whereby the Apex Court has held that the Special Judge in exercise of powers under Section 227 of the Code cannot act merely as post office or mouthpiece of prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents if any produced before the Court in the background of the basic infirmities automatically appear from the record produced by the prosecution. It is submitted that as observed by the Apex Court and this Court that the trial Judge while framing charge has undoubted power to shift and weigh the evidence for a limited purpose of finding as to whether prima facie case exists or not. The trial Judge has failed in doing so while framing charge and thereby he has failed in his duty and jurisdictional error has been committed, in view of the ratio of the cited decision.

7.6 Mr.Mangukiya, ld.counsel appearing for the petitioner-accused, has taken me through the relevant paras:14 and 26 of the cited decision and the ultimate finding of confirming the order of discharge.

8. There is clear distinction between the two concepts. In a given case, the Court may discharge the accused by shifting various aspects emerging from the evidence collected by the Investigating Agency recording a finding that the evidence is not adequate to frame a charge of a particular offence or offences registered against the accused or by observing that the evidence collected by the Investigating Agency cannot be said to be a legal evidence. It is also possible to observe that the evidence collected by the prosecution simply gives rise to a suspicion and not even a strong suspicion. When the High Court is approached for quashing of a charge or to terminate the criminal proceedings, the totality of facts emerging from the record placed by the prosecution become more relevant in the background of the

evidence collected by the Investigating Agency. Mainly the contents of the complaint or the report submitted by the Investigating Agency under Section 173 of the Code are considered being more relevant. In the present case, the Police has completed investigation and the petitioner is chargesheeted with serious charge along with charge of criminal conspiracy punishable under Section 120(B) of the Indian Penal Code. The criminal proceedings in the normal course of events ought not to be scuttled at an initial stage unless the same amounts to an abuse of process of law. It is true that the present Revision Application has not been moved pending investigation or immediately after filing of the FIR, even then unless the Court is able to reach to a conclusion that an attempt of abuse of process of law has been made by implicating the petitioner in a serious crime and there is no iota of evidence, say a legal evidence, the proceedings instituted normally should not be terminated. The ennumber of decisions signify one principal rule that the charge framed should not be quashed unless the Court is able to term it to be an abuse of process of Court and the implication of the accused is totally baseless and there is no even a strong suspicion.

9. If the say of Mr.Mangukiya, for the sake of argument, is accepted that there are important lacunas in the investigation and they are not sufficient to link the accused with the offence of criminal conspiracy, then the accused should not be forced to face the trial of such a serious offence with the persons who are according to even Police killers of deceased Gautambhai. It is difficult for the Court to accept that the strength in the evidence as to the motive or reason for involvement of the present petitioner in the crime directly or indirectly through the main accused cannot be evaluated on the allegation that the petitioner has been implicated because of some political rivalry with the local leaders of the area. Undisputedly there is some evidence collected by the prosecution to link the relation with the main accused and the present petitioner. If the evidence collected by the prosecution is led, at least the petitioner shall have to explain as to why there were frequent telephonic conversations through the cellular phone with one of the main accused. The prosecution has also attempted to collect evidence as to how the cellular phone of a particular 'SIM Card' number though firstly given to accused no.1 was found and recovered from the very accused, had reached to the said accused. It is possible to argue that this part of evidence is hazy but ultimately, the prosecution is supposed to establish link during the trial in a convincing manner as to purchase of

SIM Card of cellular phone of a particular number. It is there in evidence collected by the Investigating Agency that the cellular phone No.3568 has been recovered from one of the main accused and there is sufficient evidence of his involvement in the offence prima facie. According to the prosecution, the main accused persons were hired to commit murder of the person deceased-Gautambhai. How the deceased was trapped to reach to a particular destination is also a small story in the case of prosecution and the Investigating Agency has attempted to unfold it. The deceased and the petitioner were resident of same area and they were neighbours. But at least it will be difficult for the Court to accept that there was no element of animosity or ill-feeling between the deceased the present petitioner on any count. At least the Investigating Agency has attempted to collect evidence to show that though they were neighbours, their relations were not at least cordial or friendly.

10(i) It is true that the case of the prosecution against the present petitioner is mainly based on circumstantial evidence and the statement made by the co-accused has no legal relevance. Therefore, the circumstances collected by the Investigating Agency and pointed out by the prosecution whether can be said to be sufficient to link the accused with the crime or not can be recorded legally at the conclusion of the trial. Merely because the Police has not interrogated or arrested all the persons with whom the main accused had made conversations frequently on the day of the incident, would not make the case of the present petitioner worth quashing the charge framed by the trial Court. The Court is able to quote number of talks that had taken place between the main accused from the cellular phone recovered from him and the present petitioner and the consistent link of such telephonic conversation from the cellular phone recovered from the main accused and the telephone numbers of the present petitioner mentioned in the duration for which talk had lasted on each occasion. But it would amount to appreciating the evidence collected by the prosecution directly or indirectly and it would be more than shifting the case of prosecution. The Court dealing with the Revision Application for quashing of charge is not supposed to enter into the disputed questions of facts or even complicated questions of law, where there is scope of legal interpretation in the background of the facts of that particular case. The argument advanced by Mr.Mangukiya before the Court is that there is no sufficient material and no legal evidence to link the accused with the offence punishable under Section 120(B) of the Code and when there is no

sufficient evidence to link with the offence of conspiracy, the petitioner should not be forced to stand the trial of a serious offence, after all he is a reputed citizen, a trader and also a person in public life, having some influence on the large area of city of Ahmedabad.

10(ii) At present, the petitioner is on bail. The reasons assigned by this Court while enlarging the petitioner on bail in such a serious offence would not make the case of prosecution unsustainable or it cannot be equated with the absence of material sufficient to continue the prosecution, only if the material is not sufficient to disclose an offence, the charge framed or the trial normally should not be terminated. The yardstick of Bail Court and the trial Court is materially different.

11. In set of facts of the present case, only the trial Court will be the competent authority to say as to whether dependable evidence as to involvement of the present petitioner with regard to actual involvement as conspirator is there or not. For some small quarrel in the month of January, 2003, with Sachin, who is the friend of Gautambhai's son-Sapan, with regard to collusion of motorcycle and the car, would not tempt the petitioner for involving him in a conspiracy to kill Gautambhai, is also one of the important arguments of Mr.Mangukiya. According to him, this cannot be said to be a probability against the accused. But ultimately, the prosecution has placed the nature of evidence collected pointing out that though the deceased and the petitioner were neighbours, their relations were not cordial. This story placed by the prosecution should be discharged by this Court in a criminal proceedings initiated for quashing of the charge framed by the trial Court, does not find any favour because such submission cannot be accepted in the background of settled legal position qua quashing of a criminal proceedings.

12. Infirmity or lacuna in the case of prosecution by itself has not been found favourable situation for quashing of a charge or criminal proceedings. If the prosecution is able to bring certain incriminating circumstances leading to accusation that can be brought on record during trial as legal evidence, whereby the accused can be put under obligation to offer plausible explanation qua such circumstances proved, then in that case the charge framed by the trial Court should not be quashed and the criminal proceedings should not be terminated in exercise of inherent powers.

13. In a case of disproportionate asset acquired by a public servant (State of Madya Pradesh v. Avadh Kishore Gupta, reported in 2003 AIR SCW 6501), the petitioner had approached for quashing of criminal proceedings when the investigation was in progress. Substantial material was collected by the prosecution and, therefore, the High Court was tempted to sift the evidence. The Madya Pradesh High Court ultimately held that the material produced is not sufficient and the circumstances are not convincing and there is no scope of conviction. The Apex Court ultimately held that, "while exercising jurisdiction under Section 482, it was not permissible for the Court to act as if it was a trial Judge even when the charge is framed at that stage the Court has to only prima facie be satisfied about the existence of sufficient ground for proceeding against the accused and for that limited purpose, the Court can evaluate material and the documents on record but it cannot appreciate evidence". Mr.Mangukiya has attempted to convince the Court that certain aspects brought before the Court by the Investigating Agency including the the documents and the chart supplied by cellular phone providers should be appreciated and interpreted and if the Court is convinced that the evidence is not sufficient or certain part of evidence can be said to be weak evidence in the eye of law, then the criminal prosecution against the present petitioner should be turned down. Undisputedly, this is not a case of "No Evidence" and this Court even has no jurisdiction to appreciate the say of the prosecution like a trial Judge while dealing with the application praying discharge under Section 227 of the Code.

14. Mr.K.T. Dave, ld.APP, appearing for the respondent-State, has rightly argued that the case against the accused is based on certain facts and circumstances and this is not a case of "No Evidence" against the present petitioner. The son of the deceased and the present petitioner had quarrelled and cause was the collusion between two vehicles. Undisputedly, there is sufficient evidence to show that the accused no.3-Laxman @ Lachchu, was demanding money from the deceased. On the say of Bhavesh Dave and Indravadan Vyas as to telephonic conversation with the petitioner and the intimation given to the present petitioner that Gautambhai is murdered, of course, whether any legal weightage could be given, is a question and it will depend on the type of evidence that the prosecution may lead. The consistence conversation on the day of incident and especially the time of incident i.e. 28th April, 2003, between Bhavesh and the present petitioner,

needs appreciation. There is a statement of Nitin recorded under Section 164 of the Code, though the same is retracted statement. When there is sufficient evidence as to the use of cellular phone having no.9825074157, by the present petitioner, has some relevance. So the probative value of the statement of the witness or the contents of a particular document collected and produced by the Investigating Agency cannot be gone into even at the stage of framing of the charge. Obviously, therefore, in such a case, the charge framed by the trial Court and the criminal proceedings cannot be terminated or quashed legally.

15. The present petitioner has approached this Court immediately after framing of the charge and it is contended that by quashing the charge framed, the proceedings against him may be terminated and there is no scope of even framing of charge though he has been chargesheeted. So apparently the proceedings are in the format of Criminal Revision Application, challenging legality and validity of the order passed by the trial Court rejecting the application for discharge preferred by one of the co-accused and also against the framing of the charge against the present petitioner. But in substantio, the nature of relief prayed for by the present petitioner in para:31 of the petition has an element of praying quashing of the charge framed by the trial Court (i.e. equalent to quashing of criminal proceedings). This prayer is made mainly on the ground that this Court can appreciate the evidence collected by the prosecuting agency and enter into probative value of the evidence collected by the Investigating Agency. Undisputedly, the present petitioner had never prayed for discharge under Section 227 of the Code. It is argued by Mr.Mangukiya that after the result of the application filed by one of the co-accused for discharge, the present petitioner could have moved a similar application and thus the framing of charge is contrary to the scheme of Code and no opportunity to resist the framing of the charge can be said to have been afforded to the petitioner and, therefore, the petitioner can pray for termination of proceedings and quashing of charge. This Court can remand the matter for the purpose, is also one of the submissions. It is argued by Mr.Mangukiya that the trial Judge has incorporated a story in the charge framed which is not even in the papers of investigation. According to Mr.Mangukiya, the accused no.1 and 2 were introduced with accused no.3 by accused no.4 is the allegation of the prosecution but there is no legal evidence in the papers of investigation. The retracted statement of PW-Nitin recorded under Section 164 of the

Code vis-a-vis other statements should be able to throw light on this aspect and the version of the Investigating Officer also shall have some relevance on this aspect. This Court should not see the Case Diary for such purpose. At least the Court is able to conclude legally and safely that the proceedings against the present petitioner is not required to be terminated or the say that though there was no scope for framing of charge, the ld.trial Judge has decided erroneously to frame the charge against all the accused persons. The privilege to test the offence of retractment or inconsistency between the two statements, falls within the domain of the trial Judge and the Revisional Court cannot assume such jurisdiction.

16(i) The Court is required to assess the material to find out as to whether the facts disclosed taken at face value contain some ingredients of offence or not. This Court (Coram : J.R. Vora, J) in the case of G.B. Rathod v. State of Gujarat, reported in 2003(3) GLR 2656, has held that the prosecution case may not be the gospel truth but at the same time, nothing is found from the record to prima facie finding that the complaint filed by the complainant is utterly false. It is further observed that it must be borne in mind that the truth, veracity and effect of evidence is not required to be adjudicated at the stage of framing of the charge. Thus, the charge can be framed even when the material indicates strong suspicion about complicity of accused. In the case of State of Maharashtra and others v. Som Nath Thapa and others, reported in 1996 (4) SCC 659, the Apex Court has observed as under :

> "32. The aforesaid shows that if on the basis of materials on record, a Court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently, if the court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of a charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage."

16(ii) Undisputedly, in the present case no overt act in actual commission of offence is attributed to the present

petitioner. In other words, the prosecution case rests mainly upon the circumstantial evidence. In such a case, the Court is not bound to ascertain as to whether the prosecution intends to rely on any direct cogent circumstance or intends to bank upon certain assumptions or presumption. Here the use of cellular phone and some rapo between the accused no.1 and the present petitioner, with some animosity between the accused and the present petitioner, are the direct circumstances indicated by the prosecution and the Investigating Agency very much relies on these aspects.

16(iii) While dealing with the petition under Article 227 of the Constitution of India and Revision Application under Section 397 of the Code, what a Court is to see is whether there is some material against the accused for proceeding against him; but not as to whether he can be convicted on that material. This is not a case of absolute absence of material and, therefore, the ratio of the decision in the case of State of Maharashtra v. Priya Sharan Maharaj, reported in 1997(4) SCC 393 and Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya, reported in 1990(4) SCC 76, would help the submissions made by Mr.K.T. Dave, ld.APP.

17. The decisions cited by Mr.Mangukiya have only academic relevance and in view of set of facts available on record in the present case, none of these decisions is found applicable or helpful to the present petitioner.

18. In view of the above observations, the present Revision Application is dismissed. Notice is discharged. Interim relief granted earlier stands vacated.

(C.K. Buch, J)

Aakar

FURTHER ORDER

Heard learned counsel appearing for the petitioner. Today the Court has dismissed the Revision Application filed by the petitioner-orig.accused no.4. The matter was heard earlier and today the Court has pronounced the C.A.V. Judgment. For these much of period, the trial has not taken place because of the intervention of the Court and pendency of the present Revision Application. It is submitted by Mr.Mangukiya that this Court at least should issue direction to the trial Court not to proceed with the trial as the petitioner-revisioner intends to approach the Apex Court. There is a strong resistance from the respondent-State and it is submitted that once the

Revision Application is dismissed, this Court should not stay the trial and there is no good reason for this Court to stay the present C.A.V. Judgment.

Having considered the totality of facts and circumstances of the case emerging from record and the fact that the trial has not commenced on intervention of this Court and pendency of the present Revision Application, the petitioner should be given reasonable time to approach the Court.

So the trial Court is hereby directed not to insist for conduction of the trial upto 29th April, 2005. No further extension.

06.04.2005 (C.K. Buch, J)

Aakar